IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 638

FLORIDA EAST COAST RAILWAY COMPANY, *Appellant*

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*

On Appeal from the United States District Court for the Middle District of Florida, Jacksonville Division

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REPLY OF APPELLANT, FLORIDA EAST COAST RAILWAY COMPANY, TO MOTIONS TO AFFIRM

In our jurisdictional statement we pointed out that the "foremost" benefit found by the Commission to justify this merger was the anticipated annual savings of some $20 million per year, more than half of which was to be realized from the elimination of unnecessary jobs and the relocation of employees. We argued that the Interstate Commerce Commission made no findings to establish the essential connection between the private benefits to the merged carrier represented

by these savings and the public interest, or to establish that dollar savings to these financially healthy railroads resulting from the elimination of non-excessive competition is a public benefit. We also argued that the Commission's disregard of rail competition and reliance on intermodal competition was not supported by the record and flatly contradicts the National Transportation Policy established by Congress. The Solicitor General of the United States in a memorandum filed with the Court has also noted this latter error, as have the other appellants in the case, and we see no need for further comment on this point. Further comment is, however, desirable on the issue of the alleged benefits resulting from savings anticipated from the merger because of recent developments affecting this proposed merger.

The Commission's motion to affirm does not consider the argument, but the appellee railroads respond by saying that the Commission made clear that, as a regulatory agency, it will see to it that the anticipated savings redound to the benefit of the public, citing pages 167 and 207 of the Commission's report. The Commission at page 167 is relying upon its regulatory power over competition; it is not dealing with savings. At the latter page, the Commission simply states that these savings "should" ultimately bring about a reduction in the cost of rail service, assure adequate future transportation service in the southeast (the Commission does not find rail service to be inadequate), and permit a more coordinated, economical, efficient, and expeditious service to the public. This is not a finding. It is merely an expression of hope and is based on the Commission's assumption that a railroad monopoly will pass on savings to the public—an assumption without foundation in law, policy, or regulatory experience.

The recent labor agreement, entered into between the unions who were opposing the merger and the merging railroads, reported to this Court on November 3, 1966, in No. 640, establishes that the findings and assumptions of the Commission with respect to this "foremost" benefit are plainly invalid. The agreement, nine copies of which appellant has supplied to the Clerk of the Court, is basically an "attrition" agreement; that is, the merged carrier will take over and continue to employ all employees of the merging railroads and no employee will be deprived of employment or placed in a worse position with respect to compensation, rules, or working conditions, as a result of this merger. This agreement goes far beyond the employee protective conditions prescribed by the Commission and, as pointed out in the *Atlantic Coast Line News* of September-October 1966, attached hereto as Appendix A, gives "greater coverage" than the Commission order.

This greater coverage, of course, means that the anticipated labor savings of over $10 million will not be realized, at least to some as yet undetermined extent, and thus a substantial part of the "public benefit" of the merger disappears.

More importantly, this attrition agreement was made despite the fact that the Commission had already determined in this very case that attrition conditions requested by the unions were not consistent with the public interest (320 I.C.C. at 201).

The Commission in its report in this case noted that the Railway Labor Executives' Association requested "the imposition of certain attrition conditions." These conditions were that "(a) upon the effective date of

our order the merged company would take into its employment all employees of the merging carriers and (b) no employee who was actively employed by either of the merging carriers on the filing date of the application would be deprived of employment or placed in a worse position with respect to compensation because of the merger." The Commission rejected these conditions stating that "the applicants estimate that such conditions might cost the merged company over $170 million in wages and payroll taxes for unnecessary employees." The Commission found that even though this estimate may be far from exact "it is reasonably foreseeable that the cost would be prohibitive." Thus, the Commission held that "we are unable to conclude that conditions requiring the retention of employees in unnecessary positions would be consistent with the public interest or sound business policy" and that the "imposition of such conditions would unduly restrict carriers in the establishment of more economical operations, and would be in conflict with the objectives of the National Transportation Policy" (320 I.C.C. at 201).

We are not dealing with the fairness to the employees or the merging carriers of the new agreement. Nor are we concerned with the right to enter into such an agreement under section 5(2)(f) of the Interstate Commerce Act, 49 U.S.C. § 5(2)(f). However, in view of the Commission's findings as to the public interest in the savings to be achieved by reduction in employment and as to attrition conditions being inconsistent with the public interest, we believe the new agreement invalidates the order of the Commission authorizing this merger. The agreement destroys the basic premise upon which the Commission's approval was based.

At a very minimum, we submit that the Commission must determine whether this new agreement eliminates or substantially reduces the savings which the Commission hoped would be passed on to the public. It is obvious that, if the potential savings have been substantially reduced, even the Commission's hopes for public benefits from this merger are impossible of realization. Unless, as we contend, dollar savings are not a public benefit, in which event the Commission's approval must be set aside, the Commission must consider whether the public benefits to be realized from continued competition outweigh the reduced savings and other possible benefits now in prospect.

Respectfully submitted,

A. ALVIS LAYNE
EUGENE M. MALKIN
948 Pennsylvania Building
Washington, D. C. 20004

Attorneys for Appellant
Florida East Coast
Railway Company

FREDERICK H. KENT
Florida National Bank Building
Jacksonville, Florida 32201
Of Counsel

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APPENDIX A

(Reprinted from *Atlantic Coast Line News;* September-October, 1966, pp. 2-3.)

Agreement Reached on Expanded Employee Merger Protective Provisions

Following offers made in September by the Coast Line and Seaboard in anticipation of merger of the two Companies, to provide broadened protective conditions for the benefit of their employes, an agreement was signed on November 3 by the two railroads and a majority of the labor organizations. Negotiations are underway with the remaining organizations for similar agreements.

The November 3 agreement gives greater coverage than was required by the Interstate Commerce Commission in its Order approving the merger, and assures continued employment for all present employes of the two railroads.

It provides, among other things, that the Merged Company will take into its employment all of those who were employes of the two railroads on August 1, 1966, and subsequent to that date up to and including the date the corporate merger is made effective. After the merger no employe of either of the carriers who performed compensated service between August 1, 1966, and the date of the merger, both dates inclusive, will be deprived of employment or placed in a worse position with respect to compensation, rules, working conditions, fringe benefits or rights and privileges at any time during his employment.

The Merged Company will also take over and continue the existing employment relationships of all employes on furlough or leave-of-absence and preserve their rights and equities. Protection under the agreement will cease in the event of resignation, death, retirement, dismissal for cause in accordance with existing agreements, failure to work due to disability or discipline, or failure to exercise seniority rights in accordance with existing rules or agreements.

Employes who may be affected and their representatives are to be given at least 90 days' notice of changes contemplated because of the merger. Implementing agreements will be made to provide for transfer of work and employes, and for allocation or rearrangement of forces made necessary by those changes.

Existing working agreements will be continued in effect until they are merged into new agreements covering all employes of the Merged Company in each craft. Provision also has been made for necessary consolidation of seniority rosters and seniority districts for each class and craft of employes.

Any transferred employe required to change his place of residence is to be reimbursed for all expenses of moving his household and other personal effects. He will be reimbursed, also, for the traveling expenses of himself and members of his family, including living expenses for himself and his family and his actual wage loss during the time necessary for the transfer, and for a reasonable time afterwards (not to exceed 5 working days), used in securing a place of residence at his new location. Additionally, each transferred employe will receive a transfer allowance of $400.00.

If the employe owns his home in the locality from which he is required to move, he will, at his option, be reimbursed for any loss suffered in the sale of his home for less than its fair value. If a transferred employe is leasing his home, he will be protected against any losses incident to the cancellation of his lease.

Any employe required to transfer who has 15 or more years' service may elect to resign rather than make the transfer; in the event of resignation, he will receive a lump sum separation allowance in the amount of 12 months' pay.

Should the Merged Company determine that it has an excessive number of employes, protected employes 60 years

of age or over may, at the option of the Company, be offered in seniority order the opportunity to resign and and accept a retirement allowance based upon the age of the employe as of his nearest birthday on the date the allowance is offered. The amount of the allowance to any employe who elects to resign under the conditions will range from 4 to 12 months' pay, dependent upon his age.

In the event any dispute or controversy arises over any part of the November 3 agreement or of any implementing agreements, provision has been made for rapid arbitration to settle the controversy.

This explanation of the agreement does not include all details but is intended only to furnish its highlights as information. Copies of the agreement will be printed and made available to employes concerned.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

FLORIDA EAST COAST RAILWAY CO. *v.* UNITED STATES ET AL.;

CITY OF TAMPA, FLORIDA *v.* UNITED STATES ET AL.;

RAILWAY LABOR EXECUTIVES ASSOCIATION ET AL. *v.* UNITED STATES ET AL.; and

SOUTHERN RAILWAY SYSTEM *v.* UNITED STATES.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA.

Nos. 638, 639, 640, and 641. Decided April 10, 1967.

PER CURIAM.

The motions to affirm in Nos. 638, 639, and 641 are granted and the judgment is affirmed.

The motion to dismiss in No. 640 is granted and the appeal is dismissed as moot.

MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted in Nos. 638, 639, and 641.

MR. JUSTICE FORTAS took no part in the consideration or decision of these cases.